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STATEMENT FOR THE RAILROADS

IN OPPOSITION TO CERTAIN SECTIONS OF

H. R. 15657

RELATING TO INJUNCTIONS

SUBMITTED TO

SENATE JUDICIARY COMMITTEE

BY

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STATEMENT FOR THE RAILROADS.

To the Judiciary Committee of the Senate:

In behalf of the Railroads, I respectfully submit the following considerations in opposition to the anti-injunction provisions of H. R. 15657:

I.

The legal objections from the standpoint of the railroads to the injunction provisions of the Clayton Anti-trust Bill, H. R. 15657, were so fully and ably presented by Mr. Walker D. Hines, when they were before the Committee in 1912, in substantially identical form as the Clayton Anti-injunction Bill, H. R. 23635, that it seems a work of supererogation to restate them, and, accordingly, I respectfully refer the Committee to his printed argument, with the request that it be read and considered in connection with the pending Bill.

His points, applied to H. R. 15657, may be summarized as follows:

1. Railroads are vital to the people; are held to strictest accountability and are entitled to adequate protection.

2. Congress has imposed on the railroads numerous grave duties under the Interstate Commerce Act and the Safety Appliance Acts.

3. These statutory duties are what strikers try to interfere with, concrete examples being given from the recent Illinois Central strike.

The following extracts were read from issues in November, 1911, of the "Daily Strike Bulletin":

> "At Evansville, Indiana, the situation remains as the day the strike was called. Engines failing on every trip and freight yards are badly blocked. Fifty cars billed the

12th of October are standing in the yards loaded with perishable goods. This looks like normal business, doesn't it?''

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''At Memphis, Tennessee, the strike is showing its effect on the company, as the rolling stock is helpless. Passenger trains have to stop every eight or ten miles to allow time to get steam up as the boilers are all leaking so bad that it is impossible to keep them hot.''

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''Waterloo, Iowa, shows up fine—yards blocked with loaded freight cars that have been there for thirty days, and nobody knows where these cars are billed for or where they came from.''

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''A Bulletin received today at Burnside from Cairo, Illinois, says the Illinois Central has stopped selling tickets to any city south of Cairo and that no train has passed through Cairo south-bound since yesterday morning, on account of the complete tie-up of the road by the striking shopmen.

PASSENGERS FEAR WRECK.

''Tickets are still being sold in southern cities for points north of Cairo, but trains are later than ever. Freight trains are not running at all, or are making only short trips between adjacent cities. The general traffic is tied up more completely on the southern half of the road than on the northern half.

A number of people call up the Daily Socialist every day to inquire whether conditions on the Illinois Central are such that a passenger would be safe in making a trip to the Southern States.

Heretofore the only great inconvenience suffered by the travelers have been the innumerable and long delays and dead stops on account of engines 'dying' on a trip. But it is impossible to say what may happen.''

4. The public and the railroads are entitled to adequate protection against all unlawful acts thus preventing the performance of the public duties of railroads.

5. A railroad strike involves great extent of territory, vast numbers of strikers and frequently discloses that the local

communities sympathize with the strikers in stopping interstate commerce.

6. Section 15 so limits restraining order that it will expire before interlocutory injunction can issue, so that the public interest will have no protection in the interval.

7. Section 17 apparently confines injunction to prohibition of specified acts and does not allow any general clause. This would facilitate evasion and impair proper effectiveness.

8. Section 17 is calculated to narrow the injunction so as to invite the deliberate commission of the prohibited acts by numerous persons who ought to be compelled to respect the court's order.

9. Section 17, by using term "active concert" may permit the injunction to be defied by all whose acts are not affirmatively approved by the strikers.

10. If prohibited act is unlawful even for the strikers, it cannot be appropriate for outsiders who do not have even the justification the strikers would have. Hence Congress should not unnecessarily enable outsiders to defy injunctions issued in the public interest.

11. Union labor cannot favor the escape of outsiders whose unlawful acts defy the injunctions because those unlawful acts are always disclaimed and deplored by union labor.

12. First paragraph of Section 18 seeks to narrow foundations of equitable intervention and to impair the just remedies of complainants and the public, although justice to the defendants does not require such impairment.

13. Limitation to property rights seems designed to exclude remedies to protect the person and to protect personal freedom, although those remedies are particularly necessary in labor disputes.

14. Limitation to right of party making the application

seems designed to exclude from consideration the interest of the public always vitally involved in railroad strikes.

15. Requirement for particular description of the property is largely impracticable and will merely hamper complainants and the public and is unnecessary from standpoint of justice to defendants.

16. Last paragraph of Section 18 is an extraordinary and insidious attempt at destruction of the only available remedy against numerous wrongs which are calculated to break down transportation service in time of strike.

An apt illustration of so-called "peaceful persuasion" is found in the following letter read in evidence in *Union Pacific Railroad Co.* v. *Ruef,* 120 Fed., 102:

"Omaha Lodge, No. 31, Omaha, Nebraska.
International Association of Machinists.
Omaha Lodge No. 31.
Office of Recording Secretary, Postoffice Box 702.
OMAHA, NEBRASKA, August 11, 1902.

Mrs. E. P. Albertson.

DEAR MADAM:

It has come to the notice of this body that your husband has taken a striker's place at Columbus, Nebraska, in the Union Pacific penitentiary. He has only left the car twice to come up town, and then in the company of guards. We hope you will see the humiliating position it places you in, for your husband will be recognized wherever he goes from the picture and description which we take of every scab in the employ of the Company. It will be very humiliating for you, if you should be on the street with him, to have him pointed out as a scab. You have the right to demand the honor and esteem promised at the marriage altar, and we hope you will see the justice of our appeal, and bring all possible pressure to bear upon him, and save him from the scorn and hatred of his fellows.

Very respectfully,
GEORGE SMITH, *President,*
GEORGE LAMB, *Secretary.*"

The Anthracite Strike Commission thus refers to the secondary form of boycott; that is the boycott of innocent third

persons for refusing to take an aggressive part in a controversy with which they have no concern:

> "To say this is not to deny the legal right of any man or set of men voluntarily to refrain from social intercourse or business relations with any persons whom he or they, with or without good reason, dislike. This may sometimes be unchristian, but it is not illegal. But when it is a concerted purpose of a number of persons not only to abstain themselves from such intercourse, but to render the life of their victim miserable by persuading and intimidating others so to refrain such purpose is a malicious one, and the concerted attempt to accomplish it is a conspiracy at common law, and merits and should receive the punishment due such a crime."

17. Section 18 destroys the remedy for a nuisance committed by a crowd which by its presence and numbers obstructs the railroad employees in going to and from their work.

18. Section 18 destroys the remedy for a continuing trespass committed by a crowd unlawfully assembling on the railroad company's own premises.

19. Section 18 destroys the remedy for all forms of unlawful coercion and intimidation (except violence) of railroad employees trying to carry on the public service.

In Martin's Modern Law of Labor Unions it is said on page 229:

> "The owner of a business is entitled to have workmen come to his place of business without being subjected to violence or threats of violence. But this is not the extent of his rights. *Any course of conduct upon the part of others which deprives or substantially affects the freedom of mind of such workmen in reaching a decision to remain in or enter into his employ, or the freedom of will in carrying this decision into execution is an unlawful interference with such owner's business.*"

As to peaceful picketing, the attention of the Committee is respectfully directed to the following cases:

In *Franklin Union No. 4* v. *The People,* 121 Ill. App., 647, the union declared a strike and established a picket system.

The court, in adjudging the union itself guilty of contempt for violating the preliminary injunction, uses the following language:

> "There is no room for reasonable doubt that the union was a party to the conspiracy charged in the bill, and that the picketing was established and continued under the direction of plaintiff in error through its officers and strike committee. * * * The picket system once established, the intimidation, assaults, slugging, and bloodshed followed as naturally and inevitably as night follows day. *There can be no such things as peaceful, 'polite and gentlemanly' picketing, any more than there can be chaste, 'polite and gentlemanly' vulgarity, or peaceful mobbing or lawful lynching.*"

In *Otis Steel Co.* v. *Local Union No. 218* (N. D. Ohio), 110 Fed. Rep., 698, Wing, J., in granting an injunction, said:

> "It is peculiarly appropriate, in the analysis of these strike cases, to consider the great power which the jurisdiction to issue this writ confers, and the strict boundaries which should confine its use, because the beginning of all this trouble was the attempt of the Iron Molders' Union, No. 218, without the assistance of a court, to enjoin the complainant from operating its plant. That injunction was attempted to be enforced, not only against the complainant, but against all nonunion molders; and its terms, as addressed to the complainant, were, in substance, 'You must not proceed with your business and the operation of your plant unless you comply with the conditions which we have imposed'; and, as to the nonunion molders, 'You shall not work for the Otis Steel Company.'
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> * * * * * *

Now, what are the means, in analogy to contempt proceedings, by which this self-constituted court has attempted to enforce its injunction? The one admitted thing is the establishment and maintenance of a system of picketing. Whether this picketing has been accompanied with violence or not we need not consider. It certainly was one of the means used by this defendant organization to enforce its mandate. While picketing may not be an occasion of war, it certainly is an evidence that war exists, and the term is appropriately borrowed from the nomenclature of actual warfare. This system, constantly

kept up, in its nature leads to disturbance, and has a tendency to intimidate.

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In this case there is proof of injury and interruption to the business of the complainant by the acts of the defendants, and it is not a departure from the line of decided cases to grant the injunction prayed for. No harm can result to the defendants by the granting of the injunction, except that they will be deprived of what they apparently conceive to be their right to enforce the unauthorized injunction which they themselves have issued. It has been said in an eloquent and learned decision that it cannot too soon be learned, and learned thoroughly, that, under this government at least, freedom of action, so long as a man does not interfere with the rights of others, will be protected and maintained; and that it is unlawful for any man to dictate to another what his conduct shall be, and to attempt to enforce such dictation by any form of undue pressure. Nor must intimidation be disguised in the assumed character of persuasion. Persuasion, too emphatic or too long and persistently continued, may itself become a nuisance, and its use a form of unlawful coercion.''

20. Section 18 destroys the remedy for fraudulently inciting employees to stop work.

21. Section 18 destroys the remedy for an unlawful act when the illegality is due to the fact that the act is done by many persons during a strike.

In *Arthur* v. *Oakes*, 63 Fed. Rep., 310, Mr. Justice Harlan says on page 321:

> ''It is one thing for a single individual or for several individuals each acting upon his own responsibility and not in co-operation with others to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing in the eye of the law for many persons to combine or conspire together with intent not simply of asserting their rights or of accomplishing lawful ends by a peaceful method, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some

> injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal.''

In *Aiken* v. *Wisconsin,* 195 U. S., 195, the Court says on page 206:

> ''No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.''

22. Section 18 destroys the remedy for inciting a person to do an unlawful thing, *e. g.*, to commit a breach of contract.

In *Angle* v. *Ry. Co.,* 151 U. S., 1, the Court says on pages 13 and 14:

> ''It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer.''

23. Section 18 destroys the remedy for inciting a railroad employee to refuse to handle cars as required by the Act to Regulate Commerce.

24. Section 18 destroys the remedy for a railroad employee refusing to handle cars as required by the Act to Regulate Commerce.

25. Section 18 destroys the remedy for inciting or aiding railroad employees to go on an unlawful strike for the purpose of forcing the railroad to violate the Act to Regulate Commerce.

26. The provisions of the Bill objected to, by destroying the only effective remedy for many classes of unlawful acts designed to stop the transportation service of the country will

stimulate resort to those classes of unlawful acts on a much greater scale in the future.

27. Said objectionable provisions are a long step backward; they wipe out essential remedies so as to give a special class greatly increased power to injure the entire public.

In *Adair* v. *United States,* 208 U. S., 161, holding invalid Section 10 of the Erdman Act, which made the discharge of an employee because he was a member of a labor union a criminal offence, the Court says:

> "It is the employe as a man and not as a member of a labor organization who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration for members of labor organizations than for wage earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a co-ordinate department of the Government. We could not do so without imputing to Congress the purpose to accord to one class of wage earners privileges withheld from another class of wage earners engaged, it may be, in the same kind of labor and serving the same employer."

I wish particularly to emphasize the point (6) made by Mr. Hines against Section 15. That section, relating to temporary restraining orders to prevent irreparable injury, is so phrased as to make such orders practically useless in cases of strikes in so far as railway companies are concerned.

Railroads as a rule extend over hundreds and in many cases thousands of miles of country. Their employes are very numerous. Service of process in case of strikes is at best difficult.

The opportunities for injuries to railway property are so extensive and various as almost to baffle complete description or enumeration. And yet the temporary restraining order to prevent irreparable injury to a kind of property indispensable to the public, must expire, without regard to service upon the strikers, within a limit of time not to exceed ten days after the *entry* thereof in the clerk's office, which must follow its issuance forthwith.

How different from the carefully prepared and considered Section 263 of the Judiciary Act of 1911, which Section 15 takes occasion to expressly repeal! Said Section reads as follows:

> "Sec. 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

How different, also, from Equity Rule 73 of the Supreme Court of the United States, notwithstanding the claim that Section 15 is a substantial copy of said Rule! The Rule provides for the continuance of the restraining order until served and returned, the return day being not later than ten days.

Rule LXXIII reads as follows:

> "No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from the specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter

comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

To the points made by Mr. Hines I wish to add:

28. Section 20 of the Bill should be so amended as to exclude the right to trial by jury in cases of contempt for violation of an injunction. The present practice in contempt cases, which has prevailed in this country from the beginning, is as provided by Section 725 of the United States Revised Statutes which reads as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or demand of said courts."

The offense of contempt resulting from the violation of an injunction should be dealt with by the Judge or Chancellor who issued the injunction, and the dignity of the court and the respect due its orders, in the administration of justice, should not be dependent upon the whims or caprices or sympathies or prejudices of a jury. Any errors committed by Judges or Chancellors in contempt cases are subject to re-

view and correction by the Supreme Court of the United States, as recently shown by the decision of that court in the Gompers-Mitchell case. There is nothing in the present situation to justify such a radical change in procedure in contempt cases as proposed. It is not in the public interest but solely in the interest of the labor unions in strike cases, where an appeal to the average jury would, in many cases, I fear, make contempt of injunction orders a positive virtue.

In *Bessetts* v. *W. B. Conkey Co.*, 194 U. S., 315, the Court, through Mr. Justice Brewer, speaking of contempts in the Federal Courts, said:

> "It is true they are peculiar in some respects, rightfully styled *sui generis*. They are triable only by the court against whose authority the contempts are charged. No jury passes upon the facts; no other court inquiries into the charge. *Ex parte Tillinghast*, 4 Pet., 108. As said by Mr. Justice Miller, speaking for the court, in *Eilenbecker* v. *Plymouth County*, 134 U. S., 31, 36:
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> 'If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.'
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> See also *In re Debs, supra,* in which we said (p. 594):
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> 'But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another

court, would operate to deprive the proceeding of half its efficiency.' ''

To the foregoing quotation from *In re Debs,* 158 U. S., 564, I add the immediately following extracts from the opinion on pages 595-6:

''In the *Case of Yates,* 4 Johns., 314, 369, Chancellor Kent, then Chief Justice of the Supreme Court of the State of New York, said:

'In the *Case of The Earl of Shaftsbury,* 2 St. Trials, 615; S. C. 1. Mod. 144, who was imprisoned by the House of Lords for ''high contempts committed against it'' and brought into the King's Bench, the court held that they had no authority to judge of the contempt, and remanded the prisoner. The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge,* in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of the *Queen* v. *Paty and others,* and of the *King* v. *Crosby.*'

And again on page 371,

'Mr. Justice Blackstone pursued the same train of observation, and declared that all courts, by which he meant to include the two houses of Parliament, and the courts of Westminster Hall, could have no control in matters of contempt. That the sole adjudication of contempts, and the punishments thereof belonged exclusively, and without interfering, to each respective court.'

In *Watson* v. *Williams,* 36 Mississippi, 331, 341, it was said:

'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would

be a disgrace to the legislation, and a stigma upon the age which invented it.'

In *Cartwright Case,* 114 Mass., 230, 238, we find this language:

'The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and the twelfth article of our Declaration of Rights.' "

In *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S., 450, the Court says:

"For while it is sparingly to be used, yet the power of courts to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed upon them by law. Without it, they are mere boards of arbitration, whose judgments and decrees would be only advisory."

II.

At this point it is well to call the attention of the Committee to the fact that nowhere in the President's Message to Congress on January 20, 1914, in response to which the House has passed all of the so-called anti-trust legislation, is there any reference to the subject of injunctions.

The following extracts from the Message tend to show that the legislation called for, in the President's judgment, was to be constructive and not destructive, was to be a reflection of the consensus of public opinion and not a compliance with the persistent and threatening demand of labor unions against the rights of the property owners of the country and of non-union labor employees, which in times of strikes and consequent disorder have received the just protection of Courts of Equity since the foundation of the Republic:

"In my report 'on the state of the Union,' which I had the privilege of reading to you on the 2d of December last,

I ventured to reserve for discussion at a later date the subject of additional legislation regarding the very difficult and intricate matter of trusts and monopolies. The time now seems opportune to turn to that great question.

* * * * * *

Constructive legislation, when successful, is always the embodiment of convincing experience, and of the mature public opinion which finally springs out of that experience. Legislation is a business of interpretation, not of origination; and it is now plain what the opinion is to which we must give effect in this matter.

* * * * * *

What we are purposing to do, therefore, is happily, not to hamper or interfere with business as enlightened business men prefer to do it, or in any sense to put it under the ban. The antagonism between business and government is over. We are now about to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land. The Government and business men are ready to meet each other half way in a common effort to square business methods with both public opinion and the law.

* * * * * *

Fortunately, no measures of sweeping or novel change are necessary. It will be understood that our object is *not* to unsettle business or anywhere seriously to break its established courses athwart. On the contrary, we desire the laws we are now about to pass to be the bulwarks and safeguards of industry against the forces that have disturbed it. What we have to do can be done in a new spirit, in thoughtful moderation, without revolution of any untoward kind.

* * * * * *

We are now about to write the additional articles of our constitution of peace, the peace that is honor and freedom and prosperity.''

Certainly, the omission of all reference to injunctions in the Message and the prevalent public opinion of property owning employers and non-union labor employees, and the fact that in all of the federal railway injunctions granted, which have been comparatively few in number, there has been no case brought to the attention of Congress where there has

been an abuse of process and hardly one where error was committed, are convincing proofs that there is no demand, aside from that of the labor unions, for legislation so radical and revolutionary as that proposed in the Sections of H. R. 15657 relating to injunctions.

III.

Besides, if the labor organizations are to be exempted from the prohibitions of all anti-trust legislation; if they or their members are not to "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws," as provided by Section 7 of the Bill, the ancient and honorable jurisdiction of Courts of Chancery, in accordance with established equity principles and practice, ought to be preserved in its integrity and without modification.

Already labor leaders are claiming that the immunity granted their organizations and their members by this Section will protect them and their acts from control by the Courts. Upon the passage of the House Bill, containing this Section, the public prints report that "Frank Morrison, Secretary of the American Federation of Labor, says it confers complete exemption from prosecutions of labor unions, including strikes and primary and secondary boycotts."

Mr. Samuel Gompers, President of the Federation, is likewise reported in a speech made in New York on the tenth of June to have "exulted over the mastery that labor organizations exert in Congress and declared that labor has gotten to a situation where it no longer fears judges 'who hear their master's voice.'"

Incendiary statements such as these, wholly without justification, ought to be a warning to the Senate to do nothing more to break down the barriers of the law for the protection of civil and property rights.

IV.

No stronger reason can be found for the maintenance of the present right to injunctions in railway strike cases, unchanged and unimpaired, than is contained in the statement before the United States Strike Commission of Eugene V. Debs, the head of the great strike of 1894, when general transportation paralysis throughout the country was imminent, reported in *U. S.* v. *Debs*, 64 Fed. Rep., 724, 759, and quoted by Mr. Justice Brewer in the Debs Case, 158 U. S., 564, 597-8:

> "As soon as the employes found that we were arrested, and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike. Our men were in a position that never would have been shaken, under any circumstances if we had been permitted to remain upon the field among them. Once we were taken from the scene of action, restrained from sending telegrams or issuing orders or answering questions, then the minions of the corporations would be put to work. * * * Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up, * * * not by the army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of our employes."

If Courts are more efficient than Armies in putting an end to strikes, if the orderly and peaceful writs of the Chancellor can accomplish more than the death-dealing guns of the General, should not the Senate of the United States, in order that the transportation of the mails and of the commerce of the country be not impeded or prevented, place its seal of disapproval upon any measure that would unduly restrict the issuance of the writ of injunction and largely destroy its efficacy and thereby necessarily bring into requisition in strike cases the policeman with his club and the soldier with his gun?

As so well said by Mr. Justice Brewer in the Debs case, following the above quotation from his testimony:

> "Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States.
>
> It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstructions.
>
> A most earnest and eloquent appeal was made to us in eulogy of the heroic spirit of those who threw up their employment, and gave up their means of earning a livelihood, not in defense of their own rights, but in sympathy for and to assist others whom they believed to be wronged. We yield to none in our admiration of any act of heroism or self-sacrifice, but we may be permitted to add that it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people the means of redress of all wrongs are through the courts and at the ballot-box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence."

V.

Federal laws relating to arbitration of labor disputes where interstate carriers are concerned, such as the Erdman and Newlands Acts, furnish a strong warrant for excluding such disputes from the anti-injunction sections of this bill, on account of the great public interests involved, and because, unless so excluded, the disposition of the labor unions to submit their disputes to arbitration will be substantially diminished. If striking railway employees are to be no longer subject to the restraining power of the Courts except in extreme cases of disorder and violence; if they are only to be under the control of sympathetic peace officers of the different towns along the line of a given railway under strike, dependent in many cases upon the votes of the strikers for their positions; or, if suppression is only to come, finally, after a reign of terror, from State militia or from Federal troops, you will find, I predict, that in the majority of cases, the railway strikers will be less willing to submit to the peaceful adjustment of their differences by arbitration than they are to-day.

May I respectfully ask you to hear and heed what was said relative to railway strikes by the Arbitration Board, consisting of Messrs. Charles R. Van Hise, Oscar Straus, Frederick N. Judson, Albert Shaw and Otto M. Eidlitz, who, with a chosen representative of the Brotherhood of Locomotive Engineers (Mr. Morrissey) and of the Eastern railroads (Mr. Willard) as additional arbitrators, settled the dispute between them in November of 1912?

> "An effective strike on these railroads, extending through an area that includes all of New England, New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, the lower Peninsula of Michigan and a small part of West Virginia, would have had most disastrous effects upon the commerce and industry of this entire region, to say nothing of its effect upon the remainder of the country. Indeed, it would be difficult to

exaggerate the seriousness of such a calamity. While no statistics on the subject are available it is safe to say that the large cities of the East, if the strike had taken place, would have found their supply of many articles of food exhausted within a week. Of so important a commodity as milk they have not usually more than a day's supply. Many of the people in these cities would therefore have been short of food if the strike had taken place. Assuming that no damage were done to their property, the loss of the railroads through cessation of business would have been enormous. The total operating revenues of the fifty-two railroads concerned amount to over twenty million dollars a week, and the net operating revenue to nearly seven million dollars a week. The loss to the engineers would likewise have probably run into the millions. Their present payroll amounts to over $800,000 per week.

* * * * * *

But the loss to the public would have been vastly larger than that of both parties to the conflict. Of necessity, building operations and many other lines of employment would have ceased in whole or in part; for not only are the people of the great cities dependent upon the railroads for their daily food-supply, but the great industries depend on the railroads daily for their materials, and a week's failure on the part of the railroads to deliver materials to the manufacturers would have made it necessary for many to shut down even if the owners had wished to continue them in operation. But in any case many of the owners would have been compelled to shut down their plants, inasmuch as they could not afford to continue manufacturing articles of commerce which they had no means of transporting to the places of sale.

It thus appears if a strike of railway employes were successful in stopping traffic, its effects upon the industry of the country would be analogous to those of a general strike, simply because a great number of other industries could not continue if the railroads ceased to operate. Such a strike would have at least the partial effect of a universal strike, forced upon the public, and even the willing workers in other branches of industry. In certain general strikes of some foreign countries there have been exceptions made of certain employments necessary to human existence; but in a suspension of business through

stoppage of all transportation there would be no exception.

* * * * * *

In short, a general strike on the railroads for a great section of the country would have paralyzed the industries of that section, and, even if food were obtainable, millions of laboring people would have felt the pinch of necessity. If a strike of the character indicated lasted only for a single week, the suffering would have been beyond our power of description, and if it had continued for a month, the loss, not only in property, but in life, would have been enormous. And, as usual in such cases, the disaster would have fallen most heavily upon those least able to bear it. While the rich might have felt themselves poorer because of depleted bank accounts, they would have had sufficient for the necessities of life. The middle classes would have been injured financially; but still they could have subsisted. The working classes would have suffered actually. They would have been the ones to feel soonest, longest, and most intensely the unspeakable calamity of a general railroad strike.

* * * * * *

If in the United States there were a general strike for the eastern territory as we have seen two-fifths of the population and approximately half of the wealth of the country, every effort would undoubtedly be made to terminate the strike promptly and to operate the railroads, even though it became necessary for the President of the United States and the Governors of the States to act in concert to the extreme limits of the laws and their reserve powers, which at times of emergency are large. The military forces, both state and national, would undoubtedly be available if necessary to prevent any interference with the men who desired to work; but it is not easy to see how more than a fraction of the number of the engineers necessary to run the railroads could be secured promptly, therefore the result of an effective engineers' strike would be that already described.

It appears clear, therefore, to the Board that in the future, a controversy between the railroads for a great region of the United States and organized labor should be settled in some other way than by strike. If this position be sound, and the railroad operators accept it, they are manifestly helpless when labor organizations ask for

higher wages and threaten that if their requests are not granted they will proceed to strike. If the above is a correct diagnosis of the situation, the Board doubt whether the railroad employés fully realize their power. But if they have not realized it fully, they have realized it sufficiently to take advantage of the situation, and to vote a strike for the Eastern District.

* * * * * *

In the case under arbitration, the only thing that stood between a strike, sanctioned by the vote of 93.3 per cent. of the engineers, was the approval of the Grand Chief of the Order of the Brotherhood of Locomotive Engineers in conjunction with the committee having the matter in charge. It lay within the power of this group of men to decide whether or not a strike should take place. It is true that the power was not exercised, and that steps were taken which resulted in arbitration; but the threat of this power clearly appeared. From the viewpoint of the public it is an intolerable situation when any group of men, whether employes or employers, whether large or small, have the power to decide that a great section of the country as populous as all of France shall undergo great loss of life, unspeakable suffering and loss of property beyond the power of description through the stoppage of a necessary public service. This is a situation which we now have in this nation. It certainly is sufficiently grave to justify the Board in giving most serious consideration to the solution of the problem of determining what shall be the obligations of all of those upon whom it falls to keep in continuous operation the public utilities and particularly the railroads.''

Mr. Stephen S. Gregory of the Chicago bar, once President of the American Bar Association, who was the third arbitrator and Chairman of the Board in the arbitration of the controversy between the Western railroads and the Switchmen's Union of North America, in 1910, in announcing the award of the Board, said:

> ''There is not a railroad concerned in this arbitration but that is engaged in handling interstate commerce and indeed there is scarcely a railroad in the country but that is more or less so engaged, and all the large systems of

course very largely so, and I regard it as highly important so far as any of us concerned in any way with this important subject can promote it, that the efficacy of this national scheme of dealing with essentially a national question should be aided and encouraged. And I may say that I have hoped that while I have not been able to agree entirely with either of my associates in this matter, that the conclusions we have reached, while it has been somewhat of a compromise, may yet be recognized at least as far better than such an industrial disturbance not unfairly called by Sir James Fitz James Stephen 'War,' as has marked wage disputes in the past.

I think strikes, such a one as is now taking place in one of our large cities, are a reproach to our civilization, to our society, to our government; and I think we ought to go to the very farthest extent that we can in the effort to secure industrial peace, just as the nations of the earth are now endeavoring to secure national peace and avoid war."

VI.

A convincing argument against the wisdom or necessity for any change in the practice in railway injunction cases is furnished by typical forms of orders or decrees.

The following is a copy of the restraining order in the case of *The United States of America* v. *Eugene V. Debs et al.:*

> "Ordered, that a writ of injunction issue out of and under the seal of this court, commanding the said defendants, Eugene V. Debs (and others named), and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads to-wit:
>
> Atchison, Topeka and Santa Fe Railroad;
>
> Baltimore and Ohio Railroad;
>
> * * * * * *
>
> as common carriers of passengers and freight between or among any states of the United States; and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains or other trains;

whether freight or passenger engaged in interstate commerce, or carrying passengers or freight between or among the states; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; and from in any manner interfering with, injuring or destroying any of the property of any of said railroads engaged in or for the purpose of, or in connection with interstate commerce or the carriage of the mails of the United States, or the transportation of passengers or freight between or among the states and from entering upon the grounds or premises of any of said railroads, for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains, engaged in interstate commerce or in the transportation of passengers or property between or among the states; and from injuring or destroying any part of the tracks, roadbed or road, or permanent structures of said railroads and from injuring, destroying or in any way interfering with, any of the signals, or switches of any of said railroads, and from displacing or extinguishing any of the signals of any of said railroads; and from spiking, locking or in any manner fastening any of the switches of any of said railroads; and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines or parts of trains of any of said railroads engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of the employees of any of said railroads to refuse or fail to perform any of their duties as employes of any of said railroads in connection with the interstate business or commerce of such railroads, or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among the states; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence any of the employees of any

of said railroads, who are employed by such railroads and engaged in its service, in the conduct of interstate business or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states; to leave the service of such railroads; and from preventing any persons whatever by threats, intimidation, force, or violence, from entering the service of any of said railroads and doing the work thereof, in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and from ordering, directing, aiding, assisting or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid. And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting and printing and after service of subpoena upon any of said defendants, named herein, shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction."

In *Union Pacific Railroad Co.* v. *Ruef,* 120 Fed. Rep., 102, McPherson, J., sitting with Munger, J., in granting an injunction, said:

"I believe, and that without a doubt, that, in so far as propositions are involved in this case, the law is as follows:

(1) The defendants acted within their right when they went out on a strike. Whether with good cause, or without any cause or reason, they had the right to quit work for the Union Pacific Railroad Company, and their reasons for quitting work were reasons they need not give to any one. And that they all went out in a body, by agreement or preconcerted arrangement, does not militate against them or affect this case in any way.

(2) Such rights are reciprocal, and the company had the right to discharge any or all of the defendants, with or without cause, and it cannot be inquired into as to what the cause was.

(3) It is immaterial whether the defendants are not now in the service of the company because of a strike or a lockout.

(4) The defendants have the right to combine and work together in whatsoever way they believe will increase their earnings, shorten their hours, lessen their labor, or better their condition, and it is for them, and them only, to say whether they will work by the day or by piece work. All such is part of their liberty, and they can so conclude as individuals, or as organizations, or as unions.

(5) And the right is also reciprocal. The railroad company has the right to have its work done by the premium or piece system, without molestation or interference by defendants or others. This is liberty for the company, and the company alone has the right to determine as to that matter.

(6) When the defendants went on a strike, or when put out on a lockout, their relations with the company were at an end; they were no longer employes of the company; and the places they once occupied in the shops were no longer their places, and never can be again, excepting by mutual agreement between the defendants and the company.

(7) No one of the defendants can be compelled by any law, or by any order of any court, to again work for the company on any terms or under any conditions.

(8) The company cannot be compelled to employ again any of defendants, or any other person, by any law, or by any order of any court, on any terms, or under any conditions.

(9) Each, all, and every of the foregoing matters between the company and the defendants are precisely the

same, whether applied to the company or to the defendants.

(10) The company has the right to employ others to take the places once filled by defendants; and in employing others the defendants are not to be consulted, and it is of no lawful concern to them, and they can make no lawful complaint by reason thereof. And it makes no difference whether such new employes are citizens of Omaha or of some other city or state. A citizen of Chicago, or from any state in the Union, has the same rights as to work in Omaha as has a citizen of Omaha.

(11) Defendants have the right to argue or discuss with the new employes the question whether the new employes should work for the company. They have the right to persuade them if they can. But in presenting the matter they have no right to use force or violence. They have no right to terrorize or intimidate the new employes. The new employes have the right to come and go as they please, without fear or molestation, and without being compelled to discuss this or any other question, and without being guarded or picketed; and persistent and continued and objectionable persuasion by numbers is of itself intimidating, and not allowable.

(12) Picketing in proximity to the shops or elsewhere on the streets of the city, if in fact it annoys or intimidates the new employes, is not allowable. The streets are for public use, and the new employe has the same right, neither more nor less, to go back and forth, freely and without molestation, and without being harassed by so-called arguments, and without being picketed, as has a defendant or other person. In short, the rights of all parties are one and the same."

Judge Munger rendered a concurring opinion and the decree entered for complainant was as follows:

"It is ordered, adjudged, and decreed that each and all of the respondents not dismissed as aforesaid, and any and all other persons associated with them in committing the acts and grievances complained of in said bill, be, and they are hereby, ordered and commanded, to desist and refrain from in any manner interfering with the free use and occupation by complainant of any and all of its property or premises of every kind and

character; and from entering upon the grounds or premises of complainant for the purpose of interfering with, hindering, or obstructing its business; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employes of complainant to refuse or fail to perform their duties as such employes; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employes of complainant to leave the service of complainant; and from preventing, or attempting to prevent, any person, or persons, by threats, intimidation, force, or violence, from entering the service of complainant; or from preventing, by violence or in any manner of intimidation, any person or persons from going to or upon the premises of complainant for any lawful purpose whatever, or from aiding, assisting, or abetting any person or persons to commit any or either of the acts aforesaid; and the said respondents, each and all of them, are forbidden and restrained from congregating at or near the premises of complainant for the purpose of intimidating its employes or coercing said employes, or preventing them from rendering their service to said complainant; and from inducing, by intimidation, coercion, or threats, any employe to leave the employment of said complainant, or from attacking, assaulting, threatening, or by use of abusive language, or in any manner of intimidation, at any place within the city of Omaha, attempting to prevent any of the employes of complainant from continuing in its service, or any person or persons from engaging in the service of complainant; and each and all of them are enjoined and restrained from going, either singly or collectively, to the homes of complainant's employes, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of complainant, or from entering complainant's employ, and as well from intimidating or threatening in any manner the wives and families of said employes for the purpose of preventing any employe from remaining in the service of complainant."

In the *Atchison Machine Shop* strike in Iowa in 1904, the strikers were enjoined

"From threatening by the means of force or vio-

lence, or threats thereof, or by the use of opprobrious epithets or means of intimidation, whether upon or near the premises of said complainant or elsewhere, the employes hired and employed by said complainant in its machine shops, roundhouses, repair shops, or in its mechanical department, for the purpose of or with the design of intimidating such employes, or forcing them, or any of them, by such means to quit the service of said complainant; from inducing any employe of said complainant who may have a definite or fixed contract of employment with said complainant for a definite period, and particularly those employed by said complainant to take the places of strikers in its shops, roundhouses, or in its mechanical department, to break his or their contracts of employment with said complainant by leaving the employment of said complainant before the termination thereof; from conspiring, confederating, or combining, among themselves or with other parties, to do or accomplish any of the foregoing acts, or to cause the same to be done or accomplished, or to obstruct or impede said complainant, its agents or employes, in the carrying on of interstate commerce by said complainant, or in the discharge of the duties which it owes to the public or to the Government of the United States, or to induce or solicit any other party or parties to do or attempt to accomplish, singly or in connection with any of said defendants, any of the foregoing acts hereby or heretofore sought to be restrained or enjoined."

To what clause in any of those orders or decrees can a law-abiding citizen object? Is not every clause in the interest not alone of the owner of the property but of the public as well?

It is only the lawless and disorderly person who would feel the judicial halter around his neck.

Are the safeguards of constitutional government, as administered by the courts from time immemorial, to be swept away in these times of unrest by revolutionary legislation in the interest of a very small minority of citizens, whose industrial contests for their so-called rights have hitherto been marred in particular cases by destruction of property by

dynamite and other means and by death and injury to other citizens, employed to fill places which they had abandoned?

Are not the anti-injunction Sections of this Bill class legislation of the most vicious character?

Is it not in the highest degree contrary to the public interest to enact such legislation?

Ought not our government to remain in the apt phrase of the Supreme Court, oft repeated, "a government of laws and not of men."

VII.

Finally, in all disputes between common carriers and their employees, resulting in strikes, the public has a greater interest than either of the contending parties.

The prompt and safe and regular transportation of the mails and of persons and property from one part of the country to another far outweighs in importance to the citizens of the country as a whole the pecuniary interests involved to the carrier or the employee.

The same Report of the Board of Arbitrators, headed by President Van Hise, already quoted from, contains the following in addition:

> "It is evident therefore that for a great section of the United States a railroad strike can no longer be considered as a matter which primarily affects the railroad operators and employes. It does affect them and affects them seriously; but the public is far more deeply interested. Indeed the interests of the public so far exceed those of the parties to a controversy as to render the former paramount. To this paramount interest, both the railroad operators and employes should submit. It is therefore imperative that some other way be found to settle differences between railroads and their employes than by strikes."
>
> * * * * * *
>
> For the public utilities, however, there are not only

> two parties to the controversy—the railroads and the employes,—but a third, the public. As we have already mentioned, the railroads, one of the parties to the controversy, are subject to national and state commissions, which commissions are entrusted with the special duty of protecting the public interests. Advances in rates cannot be made without the consent of the proper commissions. The railroads are not only subject to the commissions in rates, but are subject to them in regard to maintaining their service. The employes of the railroads are not subject to control through commissions; although they are influenced in common with all organizations by public opinion."

Inasmuch as Section 22 of the Bill provides, in relation to contempts, that nothing therein shall be construed to relate "to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same * * * may be punished in conformity to the usages at law and in equity now prevailing," is not the interest of the people of the United States of such paramount importance in railway strike cases, as to entitle the owners of the railway property, conducted in the public interest, to like protection with the Nation, not only as to contempts but also as to injunctions themselves, so that their issuance and punishment for their violation may continue "in conformity to the usages at law and in equity now prevailing?"

Not alone for the railroads, but for the public welfare, and in the interest of liberty of contract and the protection of property and of human life, I appeal to you not to yield to the demand of any class, however persistent or powerful, but to maintain for all time in our country the supremacy of the law.

Respectfully submitted,

GARDINER LATHROP.

APPENDIX.

The views of the Minority of the House Judiciary Committee on H. R. 23635, submitted May 3, 1912, are so persuasive and forcible in their application to the present Bill, H. R. 15657, that they are reproduced as an Appendix.

62D CONGRESS, HOUSE OF REPRESENTATIVES. REPT. 612,
2d Session. Part 2.

REGULATION OF INJUNCTIONS.

May 3, 1912.—Ordered to be printed.

Mr. Moon of Pennsylvania, from the Committee on the Judiciary, submitted the following as the

VIEWS OF THE MINORITY.

(To accompany H. R. 23635.)

The undersigned members of the Judiciary Committee, to whom was refered the bill (H. R. 23635) to amend an act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," etc., which bill has been reported favorably, beg leave to submit herewith their views in opposition to the enactment of said measure.

The first section of the bill is intended as a substitute for the existing law on the subject of injunctions as found in section 263 of the Judicial Code, and the subsequent sections are intended to be supplementary to section 266 of the code.

According to the report of the majority of this committee, this bill intends to correct "the too ready issuance of injunctions, or the issuance without proper precautions or safeguards." If the report is predicated upon the "too ready issuance of injunctions," it is singular that it does not disclose

a single case upon which the opinion of the majority could be founded. We are well aware of the charges iterated and reiterated before congressional committees alleging abuses in the issuance of injunctions. We have not found any more evidence to support them in the past than we now find in the report of the committee. We thoroughly believe, with the Supreme Court of the United States, "that no injunction ought to be granted except in a case reasonably free from doubt. We think such rule is and will be followed by all the judges of the Federal courts."

The minority members have at all times been willing to assent to a rational proposal to further safeguard the issuance of injunctions against even the possibility of abuse, and have introduced a bill for that purpose; but we cannot consent to proposals which would operate to deprive the writ of half its efficiency in all cases and to determine its application in many instances by the character of the parties to the controversy rather than the nature of the wrong which is to be remedied. We think, furthermore, that the majority report is founded upon a misconception of the course of judicial decisions respecting statutes regulating the issuance of injunctions, and that the legislation proposed is impracticable, invalid, in the interests of a class rather than of the community, and proposes standards of legality without parallel or precedent in our legislation.

To make our position clearer, we consider the bill in the order pursued in Report No. 612:

I.

Preliminary to a discussion of the bill, the majority gives an historical resumé of legislation respecting notice in injunction cases. We believe essential elements of that history have not received the consideration deserved from the majority, and we must disagree with them respecting conclusions

drawn from both the legislation and judicial decisions of the past respecting that legislation.

On the 2d of March, 1793, was enacted legislation of which the following was a part:

> Nor shall any writ of injunction issue in any case without reasonable previous notice to the adverse party or his attorney of the time and place of moving the same. (Ch. 22, vol. 1, U. S. Stat. L., p. 534.)

The majority concludes:

> The will of Congress as thus expressed was completely thwarted and the statute nullified by the peculiar construction placed upon it by the courts.

It appears to us the majority and not the courts, have misconstrued the will of Congress. They overlook, as the court did not, the distinction described in all authoritative textbooks, familiar to every lawyer and pointed out with striking distinctness by the courts, between restraining orders intended to preserve the status quo to protect the subject matter of litigation and the preliminary and final injunctions which are issued, if at all, after hearing upon the application for the equitable remedy. That the statute in question should not be construed to prevent the issuance of restraining orders was natural and inevitable. It was a practice recognized by the English chancery from time immemorial. The early English textbooks speak of it as well understood and essential, as, for instance, Eden on Injunctions, 1821; Adams Equity, 1845.

Had the court construed the act of Congress to forbid the preservation of the subject matter of litigation until the respective rights of the litigants could be adjudicated, it would have obviously given a construction against the very essentials of justice. Indeed, the majority recognizes and admits this by its own proposal, for while it criticises the construction which permits the issuance of restraining orders without notice under special circumstances it provides in section 263 of its own bill for the doing of the very thing which it criticises the courts for having done.

We call attention to the English practice, because it was early held respecting the judicial power of the courts of the Union in equity that:

> The usages of the high court of chancery in England whenever the jurisdiction is exercised govern the proceedings. This may be said to be the common law of chancery, and since the organization of the Government it has been observed. (Penn. *v.* Wheeling, etc., Bridge Co., 13 How., 563; Meade *v.* Beale, 1 Campbell's Reports, 339, C. C. M. D. Tawney, 1850; Loring et al. *v.* March, 2 Clifford's Reports, 469.)

Thus, the courts did not "get around" the statute, as is suggested by the majority, but construed it in accordance with an immemorial practice of English jurisprudence which recognized the necessity of issuing restraining orders under special circumstances that the court might preserve the status quo, protect the subject matter of litigation, and preserve from destruction that upon which it was to pass judgment.

The report implies that the case of New York *v.* Connecticut (4 Dall., 1), upheld a construction which forbade the issuance of even restraining orders without notice. That issue is not presented in that case decided in 1799. The practice was first recoginzed four years before in the case of Schermerhorn *v.* L'Espenasse (2 Dall., 360). In this case the defendants, merchants of Amsterdam, had executed to the complainant power of attorney to receive for his own use the interest due on $180,000 of certificates of the United States, bearing interest at 6 per cent. from the 1st of January, 1788, to the 31st of December, 1790, amounting to $32,400. Notwithstanding this assignment, the defendants, on the 16th of June, 1792, received certificates for the interest and funded the amount at 3 per cent. in their own names. The bill prayed relief according to the equity of the case and a restraining order to prevent the defendants from transferring the stock or receiving the principal or interest. On the bill exhibited of the power of attorney and affidavits to the effect that the stock was registered

in the name of the defendants on the books of the Treasurer the restraining order was granted. No subpoena was served until Mr. Lewis, on bealf of the defendants, moved for a rule to show cause why the injunction should not be dissolved. The motion was refused. An examination of the record discloses that Mr. Lewis, counsel for the defendants, supported his motion for dissolution on two grounds:

> That the injunction was issued irregularly, as there was no affidavit made of the truth of the allegations contained in the bill.

In supporting this he said:

> He did not object because the injunction was issued before a subpoena was served, as there were various cases in which justice could not otherwise be obtained.

This proceeding was had two years after the passage of the statute of 1793 before a justice of the Supreme Court who had been a member of the Congress which had enacted the statute; the hearing was held in a building adjoining that in which the act was passed and in the same district where the Congress was sitting. It demonstrates as no other case can the well-recognized equity practice in relation to temporary restraining orders, and shows the construction placed upon the statute by the profession and the court. In the meantime the practice of issuing restraining orders without notice under special circumstances of necessity was approved through the exercise of the power by the highest authority, including various justices of the circuit and district courts and Chief Justice Marshall (who is observed to issue an ex parte restraining order to prevent moneys alleged to have been improperly allowed by an administrator from being taken out of the country.) (Green et al. *v.* Hanberry's Executors, 2 Brokenbrough's Reports, 405, Nov., 1830; Love *v.* Fendall's Trustees, 1 Cranch C. C., 34; Marsh et al. *v.* Bennett, 5 McLean, 117; Crane *v.* McCoy, 1 Bond's Reports, 422; Mowrey *v.* Indianapolis & C. R. Co., 17 Fed. Cas., 930.)

Too much space would be taken by the enumeration of cases

of this character, and those cited are merely offered as examples.

Finally, during the debate upon the act of 1872, now section 263 of the Judicial Code, we find two of the most distinguished lawyers of the Senate expressing the recognized practice as follows:

> Mr. CARPENTER. I understand if any judge having the jurisdiction by law to grant an injunction has presented to him a bill in equity, fortified with proofs which entitle the party by the acknowledged and usual practice of a court of equity to have an injunction, the judge has no discretion to deny it.
>
> Mr. FRELINGHUYSEN. I think that elementary provision of the law even I may have been presumed to have heard and know of.
>
> Mr. CARPENTER. Therefore, I was astonished to hear the Senator deny it.
>
> Mr. FRELINGHUYSEN. I did not deny it. (46 Congressional Globe, p. 2492.)

Thus we find the practice respecting restraining orders recognized by Congress, by the courts, and the profession throughout the history of our Government and its necessity appreciated by the majority from its incorporation in this bill. Indeed, we believe the right to issue a restraining order upon a proper showing of its necessity to protect a right of a pecuniary nature against irreparable damage is an essential part of the judicial power in equity. If a suitor over whom a court has jurisdiction by a bill in that court discloses a state of facts where irreparable harm is threatened and where, if notice were given, irreparable harm would be done before hearing could be had or decree entered, were deprived by the legislature of the right to such remedy, we believe it would be equivalent to a legislative determination in advance that under no circumstances can a plaintiff disclose a threatened irreparable injury without adequate remedy at law demanding immediate equitable intervention. If the Congress undertakes arbitrarily to determine in advance what a suitor would otherwise be

entitled to as due process of law in a court of equity, we believe he would be deprived of a guaranteed constitutional right.

The first section of the bill, with one material exception, is almost an exact copy of a bill introduced in the Sixty-first Congress, known as the Moon bill. This bill was reintroduced in the present Congress, and was supported by the entire Republican membership of the Judiciary Committee.

The exception referred to has reference to the provision for the expiration of a restraining order granted by the court without notice. The Moon bill provided that the order should expire "within such time after service is made or notice given, which shall be made or given as speedily as possible, not to exceed seven days, as the judge or court shall fix." The proposed bill provides that "it shall expire at such time after entry as the court or judge shall fix, not to exceed seven days," etc.

(Section 15 provides that it "shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix.")

A restraining order is of no effect until served, and under such a provision it would be only necessary for those having knowledge of the application to avoid service for seven days after the issuance of the order to defeat its purpose. We can conceive circumstances in which a few who might be served would notify other defendants to avoid it and on failure to make the order effective by service within seven days it would be necessary to give notice to all previously served before an extension of further time could be had. (No extension of time is provided for in the present bill.) We can conceive of no more certain method of depriving a suitor of essential equitable protection. Many judicial districts of our country administer justice over vast areas in which the material circumstances of life must be taken into consideration. The proposal of this section is general. It applies to all forms of litigation, and in view of the physical as well as the personal difficulties

attending the service of restraining orders under some circumstances we cannot but believe that not only would many individual suitors suffer grievous injury, but we can from our public service and professional experience conceive many circumstances in which the public interest would be seriously jeopardized. All of these difficulties would be overcome if the restraining order should date from the time of service instead of the time of its entry.

II.

Section 266A (Section 16) provides that no restraining or interlocutory order shall issue except upon the giving of security against cost or damage.

Under the present practice this is within the discretion of the court, and while we should not be disposed to disagree with such a suggestion, we must again note that no reason is given for the suggested change which implies a failure upon the part of the courts to properly exercise this discretion. No evidence to this effect has been at any time submitted to the committee, nor do the majority offer any evidence to that effect as a reason for their action.

III.

Section 266B (Section 17) requires every restraining order or every injunctive order "to set forth the reasons for the issuance of the same to be specific in terms and describe in reasonable detail, and not by reference to the bill of complaint or other document the act or acts sought to be restrained"; it binds only the parties to the suit, "their agents, servants, employees and attorneys or those in active concert with them, and who shall by personal services or otherwise have received actual notice of the same." This section is of general application. In support of this provision the majority point out that it is to be a safeguard against "dragnet or blanket injunctions," by which parties may be punished for contempt

after "only constructive notice, equivalent in most cases to none at all."

Again, the majority asserts conditions as a basis for proposed legislation which are both unproven and unprovable. Nothing is clearer in the field of jurisprudence than the requirement that a respondent on a contempt charge must have actual notice of the existence of an order which he is accused of violating and that the order must have been unmistakably brought to his attention. (*Bessette* v. *Conkey*, 194 U. S.) All the Debs cases, both in the circuit and district courts and on appeal, actually confirm this statement. The majority offer in proof of the necessity of their proposal merely an implication unwarrantedly reflecting upon the judiciary and without supporting proof of any character.

They have, moreover, properly provided in section 266 that every restraining order issued shall be accompanied by an entry stating the reasons for its issuance. It would be a useless waste of time to again set forth the reasons for the issuance of the order in the order itself, as is required by section 266B. Complaints are heard on every side against cumbersome and delaying procedure. This proposal multiplies the delays, difficulties, and inconveniences of procedure indefinitely. It requires every order to be a history, to repeat in irrelevant and cumbersome detail all the preliminary pleadings, and instead of enlightening the parties against whom it was issued the form suggested and the procedure prescribed would increase his confusion and doubt.

The majority point out that there is "no Federal statute to govern either the matter of making or form and contents of orders in injunctions," thereby inferring that this entire matter is left to the discretion or judgment of the judge granting the injunction. In this statement they entirely overlook the rules in equity of the Supreme Court of the United States binding upon all inferior Federal courts, prescribing with great minuteness and changed from time to time in accordance with

the teaching of experience the forms of injunctive orders and forbidding the ceaseless repetition in decrees and orders of the contents of bills of complaint.

The effect of section 266B is to abolish the many rules in equity of the Supreme Court in conflict with it, representing the professional experience of a century, and amended from time to time to shorten procedure, increase the convenience and protect the rights of litigants in the courts of the United States. The majority says section 266 does not change the best practice with respect to orders, but imposes the duty upon the courts in mandatory form to conform to correct rules as already established by judicial precedent. We respectfully submit that the equity rules of the Supreme Court express correct judicial precedents and that the majority have apparently overlooked this important fact.

The bill as reported would withdraw the application of the restraining order from parties not named in it and not in agreement with the parties named who may on their own initiative undertake its violation. Such cases are not uncommon. If the majority intend to exempt such violations of the order, they have created an unusual and remarkably privileged class of lawbreakers; if not, we are unable to discern the intention expressed in the limitation "in active concert with them."

IV.

The two paragraphs of section 266C (Section 18) must be read in connection with each other or their purpose and meaning are lost. The first paragraph provides that no judge or court of the United States shall issue any restraining order or injunction "in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning the terms or conditions of employment, unless necessary to prevent irrepar-

able injury to property or to a property right," etc. If this section is intended to withdraw civil rights from equitable protection in this class of cases, we must disapprove it as an evident effort to deny such protection as is given to civil rights in all other classes of cases, since it is axiomatic that it is the office of equity to protect by injunction, under proper circumstances, civil and even personal as well as property rights. We object to the implication contained in emphasizing controversies between employers and employees, or between employees or persons employed and seeking employment, and if the majority intends by this to indicate that such rights are to have less or different protection from the same rights when involving controversies of another kind we must emphatically disagree with the principle implied, for in this country remedies are to be predicated at all times upon the character of the rights which are threatened, and not upon the class or nature of the persons involved in the controversy.

We do not comment upon the many cases cited by the learned members of the majority in support of their views upon equity pleadings in this connection. We quite agree with the correctness of such decisions, but we draw from them quite a different conclusion from that implied by the majority. We think they prove what the majority evidently adduces them to disprove. To us they are evidence that the pleadings required with such particularity in the special class of cases involved in section 266C are required generally in all applications for equitable intervention. The majority are thus seen to be offering as proof of the need of special legislation for pleadings in a particular class of cases the fact that the courts have substantially required such conditions and pleadings in all classes of cases of which the kind enumerated are a part.

The second paragraph of section 266C contains to our mind the most vicious proposal of the whole bill. It enumer-

ates certain specific acts and provides that no restraining order or injunction shall prohibit the doing of them. Most of the acts thus recited are in themselves not amenable to the injunction process under existing law and practice. No court does or would enjoin them, but to declare by law that these acts should under no circumstances be restrained, we do not hesitate to say is a proposal without precedent in the legislative history of this country. No legislature has ever proposed that any act, however innocent itself should be sanctified irrespective of the motive or purpose of the actor. "No conduct," says Mr. Justice Holmes in *Aiken* v. *Wisconsin* (195 U. S., 194), "has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

The majority have quoted various decisions in which particular acts under the pleadings presented to the court were held lawful and their prohibition denied. The same acts under other circumstances have been held unlawful and enjoined by the very courts, and in the course of the very decisions which the majority cites. Thus, in *Arthur* v. *Oakes* (63 Fed. Rep., 310), Mr. Justice Harlan is quoted to sustain the proposition that no man can by injunction be required to perform personal service for another, and in that decision Justice Harlan eliminated from the injunction the words "and from so quitting the service of the said receivers with or without notice as to cripple the property or prevent or hinder the operation of said railroad." The majority must observe, however, that Mr. Justice Harlan likewise held, "But different considerations must control in respect to the words in the same paragraph of the writs of injunction, and from combining and conspiring to quit with or without notice the service of said receivers with the object and intention

of crippling the property in their custody or embarrassing the operation of said railroad." Thus, the same act of quitting is lawful under one set of circumstances and unlawful under another, because the concerted action in the first instance, in the opinion of Mr. Justice Harlan, "is a very different matter from a combination and conspiracy among employees with the object and intent, not simply of quitting the service of the receivers because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the railroad."

The majority undertakes to prescribe a set rule forbidding under any circumstances the enjoining of certain acts which may or may not be actuated by a malicious motive or be done for the purpose of working an unlawful injury or interfering with constitutional rights of employer or employee. In the same opinion Mr. Justice Harlan points out the impossibility of prescribing a set rule of this character and says, "The authorities all agree that a court of equity should not hesitate to use its power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. It is as Justice Story said, 'because of the varying circumstances of cases that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunction shall be granted or withheld,'" and the authority proceeds, "there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts thus operating by special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases and therefore should be fostered and upheld by a steady confidence." (Story, Equity Jurisprudence, sec. 959B; Arthur *v.* Oakes, 63 Fed., 328.)

Among the acts which the second paragraph of section 266C

declares shall not be restrained is to prohibit any person or persons to terminate any relation of employment, or from ceasing to perform any work or labor or from recommending or persuading others by peaceful means so to do; of peacefully persuading any person to work or to abstain from working, or from ceasing to patronize or employ any party to such dispute or from recommending, advising or persuading others by peaceful means, so to do''; etc.

While many of these acts are in themselves entirely harmless and would never be enjoined by any court, yet under certain circumstances the same acts might become a weapon of lawless and destructive industrial warfare demanding the protection of the courts, this section would prevent the issuance of the injunction in the Debs case (In re Debs, 158 U. S., 564); it would prevent the issuance of the injunction in Toledo & Ann Arbor *v.* Pennsylvania Co. (54 Fed., 730); it would prevent the issuance of any injunction to restrain either workmen or employers who were the objects of the most vicious form of boycott that has been passed upon by the courts, or can be devised by the ingenuity of boycotters. It changes the remedies by which the Sherman Act may be enforced, inasmuch as if any of these acts enumerated in section 266C were the means employed to enforce the restraint of trade or to damage the interstate business of any individual or corporation no injunction could be obtained either by a private individual or by Government against such acts.

In the Debs case, a combination sought to paralyze the railroads of the United States and prevent the carrying of the mail until the railroad companies would agree not to haul Pullman cars because of a controversy between the Pullman Co. and certain of its employees who were not in the employ nor in any way related to the railroad companies. It is true there were acts of violence, but the general scheme was one of persuading all employees of the railroad com-

panies to quit until the demands of the boycotters and strikers had been complied with. In the Toledo & Ann Arbor case the famous rule 12 of the brotherhood provided that none of its members should handle the cars of any carrier with which members of the brotherhood were in a dispute. In that case the brotherhood employees of the Pennsylvania refused to handle cars of the Toledo & Ann Arbor because of a dispute between that road and some of the brotherhood, and they threatened to quit the service of the Pennsylvania road unless it agreed to violate the provisions of the interstate commerce act by not affording equal facilities to the cars of another road. No violence was threatened. The brotherhood merely undertook to "peacefully persuade" the Pennsylvania Co. not to handle the cars of the other road under a threat of leaving their service—a thing which they had a perfect right to do to better their own condition, but not for the purpose of compelling the Pennsylvania Railroad Co. to violate the law.

The majority report quotes at length from the case of Pickett *v.* Walsh (192 Mass., 572), "and regret the necessity of limiting the quotations, because the whole opinion could be studied with profit." We agree with the majority that the whole opinion could have been studied with profit, since it condemns forms of "peaceful persuasion" from which the majority would withdraw equitable intervention. Speaking of the case before it, it says: "It is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. * * * It is a combination by the union to obtain a decision in their favor by forcing other persons who have no interest in the dispute to force the employer to decide the dispute in their favor. Such a strike is an interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right to coercion

or compulsion is limited to strikes against the persons with whom the person has a trade dispute; or, to put it in another way, we are of the opinion that a strike against A, with whom the strikers have no trade dispute, to compel A to force B to the strikers' demands is unjustifiable interference with the right of A to carry on his calling as he thinks best. Only two cases to the contrary have come to our attention, namely Bohn Manufacturing Co. *v.* Hollis (54 Minn., 223) and Jeans Clothing Co. *v.* Watson (168 Mo., 133)."

This case which the majority believe could be "studied with profit" is squarely against the proposal of their bill, and the two cases alluded to as being the only ones known to the court contrary to such view, for both have been overruled. Bohn Manufacturing Co. (54 Minn., 223) was overruled in Gray *v.* Building Trades Council (91 Minn., 171). The second case is alluded to by the majority of the committee in support of its contention and the majority declare the logic of the court in that case "appears unanswerable." This "unanswerable" logic was overruled by the Supreme Court of Missouri in Lohse Patent Door Co. *v.* Fuel (215 Mo., 421).

The majority report also quotes in support of their contention from Vagelahm *v.* Gunter (167 Mass., 92), saying, "Justice Holmes, now of the Supreme Court of the United States, delivered the opinion." The opinion was delivered by Mr. Justice Allen and is squarely against the contention of the majority, Mr. Justice Holmes having delivered a dissenting opinion in which he stood alone. The majority have been driven to the necessity of quoting from other dissenting opinions in support of their opposition, and to these we do not deem it necessary to give attention.

It is said by the majority that no question of constitutionality is involved. We submit that if the measure is to be construed, as it evidently is, to prevent the application of injunctive relief to certain acts in disputes between employer and employee which may be part of a scheme or plan to work

irreparable injury, which acts could be enjoined in any other department of litigation, it is obvious that the parties affected would be denied the equal protection of the law and due process of law, coming well within the rule laid down in Connelly *v.* The Union Sewer Pipe Co. (184 U. S., 540); Goldberg *v.* Stablemen's Union (149 Cal., 429); Pierce *v.* Stablemen's Union (156 Cal., 70); and Niagara Fire Insurance Co. *v.* Cornell (110 Fed., 816).

We do not consider the English act of 1906, which is quoted by the majority as a precedent for some of its proposals. There is no parallel whatever between the conditions at which the English act is aimed and the fundamental restrictions of the organic law of this country having no similitude in the constitution of the British Empire. The peculiar privileges conferred upon trades-unions by the English act of 1906 are accompanied by disabilities and criminal provisions of so drastic a nature that if they were offered as any part of the legislation of this country we should deem it our duty to oppose them in the interest of all workingmen.

We agree with the majority that "liberty and more of it is safe in the hands of the workingmen of the country." We are convinced of the merit and truth of that contention. We do not, however, believe that liberty is advanced in the person of any citizen by stripping him of remedial protection through processes which have received the deliberate and mature approval of the English-speaking race during all the centuries of its history. We can not believe that the due protection of person and property under constitutional guaranties and by remedies tested by time is "an impediment to progress," or that the destruction of the essential remedies by which person and property receive protection is "a great social advance." We believe with the President of the United States [President Taft], in a famous statement made by him many years since to the American Bar Association, "It will not be surprising if the storm of abuse heaped

upon the Federal courts and the political strength of Federal groups, whose plans of social reforms have met obstructions in these tribunals, shall lead to serious efforts, through legislation, to cut down their jurisdiction and cripple their efficiency. If this comes, then the responsibility for its effects, whether good or bad, must be not only with those who urge the change, but also with those who do not strive to resist its coming.'' (Address to American Bar Association at Detroit, 1895.)

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